Supreme Court, U. S.
FILED
JUL 30 1975
MICHAEL RODAK, JR., CLERK

No. 75-167

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

EDDIE LAWRENCE PHILLIPS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,

SHIRLEY BACCUS-LOBEL,
WILLIAM OTIS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	7
Conclusion	10
Appendix A	1a
Appendix B	13a
Appendix C	33a
Appendix D	34a

CITATIONS

Cases:

Heflin v. *United States*, 358 U.S. 415	8, 9
Milanovich v. *United States*, 365 U.S. 551	7, 8, 9, 10
Mullaney v. *Wilbur*, No. 74-13, decided June 9, 1975	8
United States v. *Dixon*, 507 F.2d 683, petition for writ of certiorari pending, No. 74-5869	9
United States v. *Gaddis*, No. 74-1141, certiorari granted, May 27, 1975	9, 10
United States v. *Neighbors*, C.A. 8, No. 74-1616, decided May 14, 1975	9
United States v. *Ploof*, 464 F.2d 116	9
United States v. *Sharpe*, 452 F.2d 1117	9

Cases—Continued Page

United States v. *Waters*, 461 F.2d 248, certiorari denied *sub nom. Robins* v. *United States*, 409 U.S. 880 3
Winship, In re, 397 U.S. 358 8

Statutes:

18 U.S.C. 2 3
18 U.S.C. 2113 ..... 2, 7, 34a
18 U.S.C. 2113(a) 2, 4
18 U.S.C. 2113(c) 3
18 U.S.C. 2113(d) 2, 4

Rules:

Fed. R. Crim. P. 31(c) 4

In the Supreme Court of the United States

OCTOBER TERM, 1975

No.

UNITED STATES OF AMERICA, PETITIONER

v.

EDDIE LAWRENCE PHILLIPS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals *en banc* (App. A, *infra*, pp. 1a-12a) is not yet reported. The previous opinion of a division of the court of appeals (App. B, *infra*, pp. 13a-32a) is reported at 502 F.2d 227.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on June 3, 1975 (App. C, *infra*, p. 33a). By order of June 27, 1975, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 2, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether one accused of possession of the proceeds of a bank robbery must be acquitted of that charge if the evidence shows that he robbed the bank.

STATUTE INVOLVED

The federal bank robbery act, 18 U.S.C. 2113, is set out in Appendix D, *infra*, pp. 34a-36a.

STATEMENT

This case arises out of the robbery of a federally insured bank in Nansemond, Virginia. The pertinent facts are summarized in the majority opinion of the panel of the court of appeals (App. B, *infra*, pp. 14a-18a).

Respondent was indicted for the robbery of the bank, in violation of 18 U.S.C. 2113(a) and (d). In April 1973 he was tried before a jury in the United States District Court for the Eastern District of Virginia. The government sought to prove that respondent was one of the four armed men who entered the bank and took $34,000. Respondent presented an alibi defense and challenged the credibility of wit-

nesses whose testimony tended to place him in the bank during the robbery.

After the jury retired to consider its verdict, it sent a note to the trial judge, asking whether respondent could be convicted if he "was involved in the bank robbery but not at the bank at the time of the robbery." The district court responded with a supplemental instruction that "if you do not believe that [respondent] was in the bank, he could not be found guilty of the crime of robbery," but that respondent could be convicted of the "lesser included offense" of possession of what he knew to be the proceeds of that robbery.[1] Ten minutes later, the jury returned the following verdict:

> We, the jury, find the defendant guilty of the lesser offense of possession of stolen money with knowledge that the money was stolen from the bank.

Three months later the district court set aside the jury's verdict on the ground that possession of the proceeds of the robbery, in violation of 18 U.S.C. 2113(c), had not been alleged in the indictment. The court granted respondent a new trial, "to proceed only upon the lesser included charge of possession of

---

[1] The district court's supplemental instruction was incorrect. An individual can aid or abet a robbery without being physically present; 18 U.S.C. 2 provides that an aider or abettor can be punished as if he were a principal. See *United States* v. *Waters*, 461 F.2d 248 (C.A. 10), certiorari denied *sub nom. Robins* v. *United States* 409 U.S. 880. One obvious example would be the driver of a getaway car.

money, knowing the same to have been stolen in a bank robbery." [2] In September 1973, respondent was indicted for possession of the proceeds of the bank robbery; the indictment charging respondent with the robbery itself was dismissed on the government's motion.

Respondent's possession of a portion of the robbery proceeds was uncontroverted. In the trial for possession of the proceeds, the central issue was whether respondent knew that the proceeds had been stolen.[3] Respondent objected to the introduction of evidence tending to show that he had been present in the bank during the robbery. He argued that the jury's verdict at his first trial should be interpreted as a finding by that jury that he was not present, and that this finding collaterally estopped the government. The objection was overruled and the district court admitted the evidence. The court instructed the jury, however, that the evidence of respondent's presence in the bank could be used by it only for the purpose of ascertaining whether respondent knew that the money had been stolen. The jury, too, convicted respondent. The court sentenced him to a term of ten years' imprisonment.

[2] If the crime of possession of proceeds stolen in a bank robbery were, in fact, a "lesser included offense" to the crime of robbery, respondent's conviction at the first trial would have been proper. It is unnecessary expressly to include lesser offenses in an indictment. Fed. R. Crim. P. 31(c). However, we agree with the court of appeals (App. A, *infra*, pp. 5a-6a) that possession of the proceeds is not a lesser included offense to the crime of robbery; proof of possession requires proof of facts unnecessary to proof of a violation of 18 U.S.C. 2113(a) or (d).

[3] Evidence introduced at both of respondent's trials established that shortly after the robbery he had purchased an automobile with money including "bait" money stolen from the bank. See first trial Tr. 57, 72; second trial Tr. 51, 95-97.

A divided panel of the court of appeals reversed (App. B, *infra*). The majority of the panel held that the first jury's verdict was a constructive acquittal on the charge of bank robbery, which meant, in light of the judge's charge minutes before, that the jury had found as a matter of fact that respondent had not been in the bank. Consequently, the panel held, evidence tending to establish his presence in the bank was inadmissible in the second trial. The court rejected the government's arguments that the jury's silence on the robbery count was equivocal and that, in any event, collateral estoppel should not apply because the limited purpose for which the evidence was used at the second trial did not require the proof of respondent's presence to be convincing beyond a reasonable doubt.

On rehearing *en banc* the court of appeals vacated the panel's decision. Seven judges participated in the *en banc* rehearing. Four judges (Chief Judge Haynsworth and Judges Craven, Butzner and Widener) concluded that the prosecution was not collaterally estopped by the first jury's verdict from introducing the evidence in question. However, the three judges who believed that collateral estoppel applied (Judges Winter, Russell and Field) were joined by Chief Judge Haynsworth and Judges Craven and Butzner

in voting to reverse respondent's conviction. The latter three judges held that, as a matter of law, the introduction of evidence that respondent was in the bank established his innocence to the charge of possession because it demonstrated that he was one of the robbers. In other words, these three judges believed that being a robber was a defense to the charge of possession of the proceeds.

As Judge Widener pointed out in his dissent, the government prevailed on both of the major issues in the case. The court held, four-to-three, that the government was not estopped; the court also held, four-to-three, that being a robber is not a defense to the charge of possession of the proceeds. Nevertheless, because the minorities on both issues combined, respondent's conviction was reversed by a vote of six-to-one. The court remanded for still another trial, at which neither the prosecution nor the defense would be allowed to introduce evidence tending to show that respondent was present in the bank during the robbery.[4]

---

[4] Five judges concluded that respondent, as well as the government, was barred from introducing such evidence. Chief Judge Haynsworth and Judge Butzner concluded that respondent was equitably estopped (by his alibi defense at the first trial) from now attempting to prove that he was one of the robbers. Judges Winter, Russell and Field concluded that respondent was collaterally estopped by the first jury's verdict from attempting to establish that he was a robber. Judges Craven and Widener would have allowed him to introduce such proof; in the view of Judge Craven the evidence would have established respondent's innocence, and in the view of Judge Widener it would have established respondent's guilt.

REASONS FOR GRANTING THE WRIT

This case presents still another of the multifaceted problems in the interpretation of the federal bank robbery act, 18 U.S.C. 2113, that have been created, in large measure, by this Court's opinion in *Milanovich* v. *United States*, 365 U.S. 551. According to three judges of the court of appeals, *Milanovich* holds that evidence tending to show that an accused robbed a bank also tends to show that he is innocent of the crime of possession of the proceeds of that robbery.

The majority of the court of appeals disagreed with these three judges. Ordinarily, therefore, we would not seek certiorari to review this question, on which we nominally prevailed. However, although we prevailed on both major issues in the court of appeals, the judgment was adverse to us. The three judges who believe that being a robber is a defense to the charge of possession of the proceeds cast the controlling votes; if the error of that view is established, the United States will be entitled to a judgment in its favor.

If one charged with possession of the proceeds of a robbery could defend by relying upon evidence tending to show that he had been a robber, many individuals obviously guilty of either one crime or the other would escape conviction entirely. If the evidence of participation in the robbery is equivocal,

and the evidence of possession of the proceeds is clear, it would be impossible to obtain a conviction. If the individual were charged with robbery, he could claim that the equivocal evidence of personal participation failed to establish his guilt beyond a reasonable doubt; on the other hand, if the individual were charged with possession of the proceeds, he could claim successfully that, in light of the equivocal evidence of his participation as a robber, the prosecution could not establish beyond a reasonable doubt that he was *not* a robber. Cf. *Mullaney* v. *Wilbur*, No. 74-13, decided June 9, 1975; *In re Winship*, 397 U.S. 358. While this result would clearly be unjust, it is logically compelled by the view that a charge of possession may be defeated by proof of participation in the robbery.

Nothing in the bank robbery act or the decisions of this Court necessitates such a bizarre result. *Milanovich* held that when an individual is tried on charges of both larceny and receipt of the proceeds, the jury must be charged that it can "convict" of either but not of both (365 U.S. at 555). The Court wrote (365 U.S. at 553-554): "in the absence of a contrary indication by Congress, a defendant charged with offenses under statutes of this character may not be *convicted and punished* for stealing and also for receiving the same goods." (Emphasis added.) *Heflin* v. *United States*, 358 U.S. 415, upon which *Milanovich* was partially based, enunciates the same rule; *Heflin* held that those who had been convicted and punished for robbery could not be separately con-

victed and punished for possession of the proceeds. Respondent has been neither convicted nor punished as a robber, and therefore he is liable to conviction for possession of the proceeds.[5] In order to conduct a fair trial for that offense, the prosecution should be entitled to introduce all relevant and probative evidence, including evidence that would show incidentally that respondent might have been a robber.

We believe that it is not necessary for the Court to undertake plenary consideration of this issue. In *United States* v. *Gaddis*, No. 74-1141, certiorari granted, May 27, 1975, we have argued that *Milanovich* was incorrectly decided and should be overruled. See also *United States* v. *Sellers*, petitions for writs of certiorari pending, Nos. 74-1476 and 74-6503.[6] The three judges who concluded that being a robber is a defense to a charge of possession relied solely on *Milanovich* for their belief; if this Court overrules *Milanovich*, it would be appropriate to remand this case to the court of appeals for reconsideration or summarily to reverse the decision below. Even if

---

[5] The courts of appeals that have considered this problem have held that *Heflin* and *Milanovich* preclude only double convictions, and are not applicable when an individual is accused or convicted of but a single crime. See *United States* v. *Dixon*, 507 F.2d 683 (C.A. 8), petition for a writ of certiorari pending, No. 74-5869; *United States* v. *Sharpe*, 452 F.2d 1117, 1119 (C.A. 1). Cf. *United States* v. *Neighbors*, C.A. 8, No. 74-1616, decided May 14, 1975; *United States* v. *Ploof*, 464 F.2d 116 (C.A. 2).

[6] We are furnishing to respondent copies of our brief in *Gaddis* and our petition in *Sellers*.

the Court does not overrule *Milanovich*, its opinion in *Gaddis* is likely to cast new light on the interpretation of the bank robbery act that would make reconsideration by the court of appeals appropriate. If, upon reconsideration, the three judges of the court of appeals recede from their view, the government will prevail and respondent's conviction for possession of the proceeds will be reinstated.[7]

[7] We have not presented the collateral estoppel issued for resolution by this Court. Ambiguous verdicts similar to the one at respondent's first trial do not appear to generate frequent litigation over collateral estoppel issues, and it would be appropriate to await further developments in the courts of appeals before this Court undertakes to address the question. Moreover, we believe that the court of appeals' resolution is manifestly correct. The majority of the court of appeals adopted the position of the dissenter on the panel: (1) the jury's ambiguous pronouncement is more readily understood as the consequence of an inability to agree than as a finding adverse to the prosecution concerning respondent's presence in the bank; and (2) if any meaning is to be attached to the failure of the jury to return a verdict on the robbery charge, it meant at most that the prosecution had not established that respondent was present in the bank beyond a reasonable doubt; such a finding should not estop the prosecution from introducing evidence of his presence in a subsequent prosecution in which such evidence would be relevant if presence were not established beyond a reasonable doubt (presence in the bank was not an element of the possesion offense, and thus did not have to be established beyond a reasonable doubt; but a probability of presence, combined with other evidence, could contribute to the critical finding of guilty knowledge).

CONCLUSION

This petition should be held pending the Court's decision in *Gaddis* and disposed of as appropriate in light of the Court's disposition of that case.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

SHIRLEY BACCUS-LOBEL,
WILLIAM OTIS,
Attorneys.

JULY 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73-2516

EDDIE LAWRENCE PHILLIPS, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

Reargued January 6, 1975 Decided June 3, 1975

Before HAYNSWORTH, Chief Circuit Judge, and WINTER, CRAVEN, BUTZNER, RUSSELL, FIELD and WIDENER, Circuit Judges, Sitting En Banc.

Alan P. Owens, Attorney for Appellant, J. Brian Donnelly, Assistant United States Attorney, Attorney for Appellee.

PER CURIAM:

A majority of the panel reversed Phillips' conviction and remanded for a new trial. *United States* v. *Phillips*, 502 F.2d 227 (4th Cir. 1974). On rehearing en banc a majority of the court, although fragmented as to theory, also votes to reverse the conviction and remand for a new trial, but with additional instructions to the lower court.

The main disagreement is whether Phillips' conviction at a second trial of knowing possession of stolen bank money, 18 U.S.C. § 2113(c), was invalid under the doctrine of collateral estoppel or under what may be termed the mutually-exclusive-offense rule laid down in *Milanovich* v. *United States*, 275 F.2d 716, 719 (4th Cir. 1960), *aff'd in part, rev'd in part*, 365 U.S. 551 (1961).

Judges Winter, Russell, and Field would hold that for the reasons set forth in the majority panel opinion the doctrine of collateral estoppel applies: "[T]he jury's decision in the first trial to acquit Phillips of bank robbery . . . effectively determined that Phillips was not in the bank at the time of the robbery." *Phillips* v. *United States, supra*, at 231. They find reversible error in permitting the government at the second trial to offer proof that Phillips *was* present at the bank during the robbery, even

for the limited purpose of showing that Phillips possessed the money with knowledge that it had been stolen. *Ashe* v. *Swenson*, 397 U.S. 436 (1970). If the government elects to try Phillips anew, it should therefore not be permitted to offer proof, for any purpose, that defendant was in the bank. Furthermore, Phillips should similarly be barred from defending against the charge of possession by offering proof that he *was* in the bank and therefore was a "thief" rather than a "receiver." He, having benefitted by the jury's determination in the first trial, should be estopped from controverting the jury's finding.

Chief Judge Haynsworth and Judges Craven, Butzner, and Widener would hold that on the facts as recited in the panel opinion the jury's implicit acquittal of bank robbery in the first trial did not collaterally estop the government from showing guilty knowledge by proof of defendant's presence and participation in the robbery. *See United States* v. *Phillips, supra*, at 227 (Craven, J., dissenting). Judge Widener, however, in so rejecting Phillips' collateral estoppel argument, concludes for the reasons stated in his concurring and dissenting opinion that the instant conviction is free of error, and would affirm.

Chief Judge Haynsworth and Judges Craven and Butzner on the other hand find plain and reversible error in the lower court's failure to charge the jury in the second trial that if they believed Phillips was in the bank as a participant during the robbery

they could not convict him of receiving and possessing stolen money. Since he had been acquitted in the first trial of bank robbery under § 2113(a), he was, as far as the combined effect of the two jury trials, either guilty of receiving and possessing the stolen funds or wholly innocent. To permit the second jury to believe that Phillips participated as a *thief* in the bank robbery—for purposes of showing guilty knowledge in his capacity as a receiver—would implicitly violate the mutually-exclusive-offense rule:

> "[I]n the absence of a contrary indication by Congress, a defendant charged with offenses under statutes of this character may not be convicted and punished for stealing and also for receiving the same goods."

Milanovich v. *United States*, 365 U.S. 551, 553-54 (1961), *quoting from Milanovich* v. *United States*, 275 F.2d at 719. *See Heflin* v. *United States*, 358 U.S. 415 (1959).

Thus, at any subsequent retrial, any proof by the government tending to show that Phillips was a bank robber would have to be accompanied by a *Milanovich* instruction. Thus, as a practical matter, the government could not show Phillips was in the bank to show guilty knowledge in receiving the stolen money for to do so would establish incapacity to be guilty as a receiver/possessor under *Milanovich*.

While under the view that it is *Milanovich* and not collateral estoppel that controls the government's position at retrial, Chief Judge Haynsworth and

Judge Butzner join Judges Winter, Russell, and Field in holding that Phillips is estopped at any new trial from offering evidence that he was a bank robber. They (Haynsworth and Butzner) do not think there is any collateral estoppel by judgment, but they think there is an equitable estoppel against a complete reversal of his position by Phillips. At the first trial he presented alibi witnesses in an effort to prove he was not in the bank, and his attorney, on his behalf, apparently succeeded in persuading the jurors that they could not unanimously find beyond a reasonable doubt that he was one of the robbers. It is their view that an equitable estoppel prevents his now offering himself, or other witnesses, in an effort to prove that he was one of the robbers.

Judge Craven and Judge Widener agree that Phillips is not estopped in a subsequent retrial.

Thus, four members agree that the doctrine of collateral estoppel did not apply against the government; six members agree that the government is at least in practice barred on retrial from presenting evidence of Phillips' participation; and five members agree that Phillips is estopped on retrial from defending the possession charge by showing that he was a bank robber.

Accordingly, the court holds:

1. The panel decision is hereby vacated.

2. Possession of money stolen from a bank, made unlawful by 18 U.S.C. § 2113(c), is not a lesser

included offense under 18 U.S.C. § 2113(a) (bank robbery).

3. One may not be convicted and punished for both bank robbery and possession of money stolen from a bank under 18 U.S.C. §§ 2113(a) and 2113 (c) as a result of a single occurrence. *Milanovich* v. *United States*, 365 U.S. 551 (1961). But one who is not guilty of bank robbery may be validly convicted of possession, and *vice versa*.

4. On the facts of this case as recited in the prior panel opinions, *Phillips* v. *United States*, 502 F.2d 227 (4th Cir. 1974), the doctrine of collateral estoppel as set out in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), does not apply to foreclose any proof by the United States.

5. Phillips' conviction under 18 U.S.C. § 2113(c) is reversed and the case is remanded to the district court for a new trial on the same charge within a reasonable time, if the government so chooses.

6. Since a majority are agreed that as a practical matter, although for different reasons, evidence of Phillips' participation in the robbery should not be admitted, the district court should exclude it if offered by the United States.

7. Phillips is estopped from offering evidence that he was one of the bank robbers.

REVERSED AND REMANDED WITH INSTRUCTIONS.

WIDENER, Circuit Judge, dissenting:

I must respectfully dissent, although my brothers have styled this opinion as concurring and dissenting because of some very slight agreement with some of them along the way.

Whether we agree with Coke, that the life of the law is logic, or Holmes, that it is experience, this decision will fit in neither category. And I had taken it as assumed that everyone agreed with Cardozo that litigants are entitled to an explanation for the rulings of courts, but, here, the very opinion of the court is contradictory by its own terms, and I submit no rational basis has been exhibited for our decision.

The case started with the assignment of error made that evidence offered by the government which tended to show the defendant to have been in the bank at the time of the robbery was inadmissible in a prosecution for receiving the money taken in the robbery.

Since receiving stolen money is not a crime unless the act is done "knowing" that the same is stolen, 18 USC § 2113(c), the naked proposition asserted as error seems to me to be frivolous on its face, yet the result reached by this court is an endorsement of that principle. If evidence which tended to prove that Phillips was present and saw the money as it was being stolen from the bank is not both relevant and material to show that he had knowledge it was stolen money, I am at a loss to explain how better evidence could be adduced.

Even if the argument be made that evidence of other crimes is ordinarily not admissible generally in criminal trials, so that the robbery of a bank might not be admissible in a trial for knowingly receiving the fruits of the robbery, we have uniformly held that evidence relevant to the offense charged is not made inadmissible merely because it may show that the defendant also had committed another crime with which he was not presently charged. *United States* v. *Weems*, 398 F2d 274 (4th Cir. 1968) (indictment for kidnapping in which the evidence showed additional assault and rape); *United States* v. *Frasier*, 418 F2d 854 (4th Cir. 1969) (indictment for kidnapping in which the evidence showed additional armed robbery).

It seems to me that with the simple and easily understood proposition just above recited the case ought to have been ended, but, unfortunately, it has not. We have taken the case of *Milanovich* v. *United States*, 365 US 551 (1961), which sets out a simple procedural protection for criminal defendants, having nothing to do with evidence, and from it fashioned a rule of evidence which will prevent the United States from offering evidence that the defendant was in the bank and saw the money being stolen, or even participating in its theft, in order to prove he had knowledge the money was in fact stolen. In *Milanovich*, the defendant was convicted of stealing money of the United States and also of receiving the same money under 18 USC § 641, and had been sentenced to ten years on the stealing

charge and five years for receiving. On appeal to this court, we set aside the five-year conviction for receiving, holding the defendant could not be convicted and sentenced under both counts but could on one, so we chose to leave the defendant with the sentence having the greater punishment. The Supreme Court reversed, saying that although a defendant could not be convicted and sentenced on both counts, it was the function of the district court and the jury to determine which count, if either, the defendant should be convicted of, and remanded the case not merely for resentencing but for a new trial under an instruction that the jury could convict of one crime but not both. What the opinion of the court here ignores is that *Milanovich* was sent back for trial on both charges. The case (*Milanovich*) has nothing to do with the admissibility, relevancy, or materiality of evidence, and I cannot accommodate myself to such a strained reading as is present here.

With these thoughts in mind, I turn to the opinion of the court.

Four judges out of seven have agreed that the government is not estopped from offering evidence to show that the defendant was in the bank, so at this point the admittedly relevant evidence is admissible.

Next comes the proposition that three judges of the court find error in the failure of the district court ". . . to charge the jury that if they believed Phillips was in the bank as a participant in the rob-

bery they could not convict him of receiving the stolen money." This opinion is based on *Milanovich* and a statement in that case that a defendant "may not be convicted and punished for stealing and also for receiving the same goods." 365 US 551, 554. Four judges, however, do not agree that it was error not to give such instruction, so at this point the evidence is still admissible (4-3), and it has been decided the offending instruction should not be given (4-3).

Despite the fact that four judges voted against giving the instruction, the opinion of the court then recites ". . . any proof by the government tending to show that Phillips was a bank robber would have to be accompanied by a *Milanovich* instruction." The question immediately presents itself as to how three judges' belief an instruction should be given may prevail over four judges who are of opinion the instruction should not be given. From this rather shaky platform, the opinion of the court then continues, "Thus, as a practical matter, the government could not show Phillips was in the bank to show guilty knowledge in receiving the stolen money, for to do so would establish incapacity to be guilty as receiver/possessor under *Milanovich*." This conclusion, based as it is on the votes of only three judges, is only an opinion of a minority of the court. Basing a decision on a minority vote, I find quite unacceptable.

Having previously departed from the proposition that I had always considered universal, that a majority vote controlled judgments of this court, five of the judges then join in the opinion that the defendant is estopped from offering evidence that he was a bank robber, although the opinion recites that it is the opinion of the court (but only joined in by three judges) that the evidence is relevant and should acquit Phillips if believed by the jury. This finding is based on the fact that since Phillips offered alibi evidence at the first trial he is estopped to take a different position at a second trial. Three judges apparently do this on the ground of collateral estoppel, and two on the ground of equitable estoppel. The objections to this proposition are so numerous that I will not attempt to classify them. Suffice it to say it is my opinion that a criminal defendant, upon his plea of not guilty in a criminal case, may offer any kind of defense he has to the charge against him, whether by way of denial, or affirmative defense, or inconsistent defense, or otherwise. He is entitled to a trial *de novo*. The plea of not guilty in a criminal trial puts even the most frivolous contention of fact in issue, if necessary to a conviction, and such plea should not be subject to the nice distinctions of pleading and procedure in civil cases, including either collateral or equitable estoppel. To me, the proposition that the defendant is estopped from offering admittedly relevant evidence is even more astonishing than the proposition that the government may not offer it. Although I do not agree that the evidence that Phillips was in the bank should tend to prove his innocence, rather I think it should tend to prove his

guilt, if it is relevant, he is entitled to introduce it, and a decision to the contrary, in my mind, deprives him of a fair trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2516

EDDIE LAWRENCE PHILLIPS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk

Argued April 2, 1974 Decided August 13, 1974

Before: CRAVEN, ADAMS * and RUSSELL, *Circuit Judges.*

Alan P. Owens, Attorney for Appellant, J. Brian Donnelly, Assistant United States Attorney, Attorney for Appellee.

---

* United States Circuit Judge for the Third Circuit sitting by designation.

ADAMS, *Circuit Judge*:

This appeal calls for an application of the time-honored principle of collateral estoppel [1] in a somewhat unusual factual setting.

I.

The appellant, Eddie Lawrence Phillips, was indicted under 18 U.S.C. 2113(a) and (d), and charged with robbing a federally insured bank in Nansemond, Virginia. On April 16 and 17, 1973, Phillips was tried before a jury. At that trial, the government sought to prove that Phillips was one of four armed men who had entered the bank, perpetrated a robbery in the bank during which a gun was fired, and then made off with some $34,000 in bank funds. Phillips' counsel sought to establish an alibi defense, and specifically challenged prosecution witnesses whose testimony tended to place Phillips in the bank during the robbery.

At the conclusion of the evidence, and after closing statements by counsel, the district judge proceeded to instruct the jury on, among other things,

[1] The term "collateral estoppel" is itself of comparatively recent coinage. *See Developments-Res Judicata,* 65 Harv. L. Rev. 818, 840 (1952). However, the broader principle of *res judicata*—of which collateral estoppel is an aspect—has roots in Roman law, in early English practice, and in continental jurisprudence. *Id.* at 820. The policy rationales underlying the two doctrines are essentially the same *See Cleary, Res Judicata Reexamined,* 57 Yale L. J. 339, 344 (1948).

the necessary elements of the crimes charged.[2] The jury retired to consider its verdict, but before concluding its deliberations posed the following query to the district judge:

> "If we believe that Phillips was involved in the bank robbery *but not at the bank at the time of the robbery* is he considered guilty or not guilty?" [3] (Emphasis added)

The district judge responded to the jury's question with the following supplementary instruction:

> "I specifically tell you that insofar as the question of robbery of the bank, *if you do not believe that Phillips was in the bank, he could not be found guilty of the crime of robbery of that*

[2] 18 U.S.C. § 2113(a) provides, in part, that:

> "Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another any property or money . . . belonging to or in the care of, custody, control, management, or possession of, any [federally insured] bank . . . or
>
> "Whoever enters, or attempts to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank . . . or any larceny
>
> Shall be fined not more than $5000 or imprisoned not more than twenty years, or both."

18 U.S.C. § 2113(d) provides that:

> "Whoever in committing . . . any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

[3] Tr. 342, trial of April 16, 17, 1973.

> *bank.* If you believe that the event, that his participation was not as one of those who were in the bank, I repeat, you could not find him guilty of robbery of that bank." [4] [Emphasis added]

However, the district court proceeded to instruct the jury that it might find Phillips guilty of possession of, or disposing of, what he knew to be the proceeds of the bank robbery. This offense was styled by the trial judge a "lesser included offense" under the indictment for bank robbery.[5]

Ten minutes after the supplementary instruction was given, the jury returned the following verdict:

> "We, the jury, find the defendant guilty of the lesser offense of possession of stolen money with knowledge that the money was stolen from the bank." [6]

On July 18, 1973, the district court set aside the conviction based on possession, on the grounds that it was not included in the indictment, and granted Phillips a new trial, "to proceed only upon the lesser included charge of possession of money, knowing the same to have been stolen in a bank robbery." In September of 1973, the grand jury issued a new indictment, under U.S.C.A. § 2113(c), charging Phillips only with illegally possessing the money

---

[4] Tr. 346, trial of April 16, 17, 1973.

[5] Tr. 346, trial of April 16, 17, 1973.

[6] Tr. 349, trial of April 16, 17, 1973.

which he had earlier been indicted for stealing.[7] On motion by the government, the earlier indictment for bank robbery was dismissed.

Phillips proceeded to trial upon the new indictment on November 14, 1973. Prior to the swearing in of the jury, Phillips' counsel moved the district court to prohibit the introduction of any evidence tending to show Phillips' presence in the bank at the time of the robbery. The stated ground for this motion was that the issue of Phillips' presence at the bank during the robbery had been adjudicated in Phillips' favor at the first trial.

He maintained that the first jury, by having failed to convict him of bank robbery, the offense for which he was primarily charged in the first trial, had determined that he was not in the bank during the robbery. Phillips' motion to exclude evidence showing his participation in the robbery was overruled.

The jury was sworn, the second trial proceeded, and the government, over continuing objection by Phillips' counsel, proferred evidence tending to establish that Phillips participated in the robbery itself, and specifically that he had been in the bank. Government counsel made several statements to show

---

[7] *See* 18 U.S.C. § 2113(c). The government's attempt to obtain a new indictment on the possession charge stemmed, apparently, from its view that possession under the subsection (c) is *not* a "lesser included offense" under subsection (a). We assume, with the government, that an offense under (c) is not a lesser included offense under (a). The dissent appears to make the contrary assumption.

that Phillips had taken an active part in the robbery.[8] Before the jury returned, the district court gave the following instruction regarding the evidence of Phillips' involvement in the robbery:

> "Any evidence admitted at this trial concerning statements alleged to have been made by the defendant that he participated or had any connection with the bank robbery was admitted only on the question of knowledge of the defendant that if he possessed any money taken in the robbery he possessed it knowing it had been stolen." [9]

The jury found Phillips guilty of possession of the stolen money, with knowledge that it had been stolen.

On this appeal Phillips invokes the principle of collateral estoppel and contends, *inter alia*, that the district court erred in admitting evidence at the second trial that tended to prove he was present at the bank when the robbery took place. Phillips further contends that testimony as to what occurred in the bank at the time of the robbery prejudiced him, since it showed the use of force on bank personnel. Phillips asserts that because of the prejudicial nature of this evidence, he is entitled to a new trial. We agree, and reverse Phillips' conviction.

II.

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a

[8] Tr. 15, trial of Nov. 14, 1973.

[9] Tr. 285, trial of Nov. 14, 1973.

valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." [10] Considerations of judicial economy, conservation of public funds, and avoidance of multiple litigations underly the doctrine.[11] Implicit, of course, in any limitation on relitigation of issues already determined in the criminal context is an appreciation of the substantial burdens, psychological as well as otherwise, placed on one who must defend against criminal prosecution.[12] At least since 1916, collateral estoppel has been an acknowledged rule of federal criminal law.[13] Since 1970, the rule has been recognized as an integral aspect of federal constitutional law as well, under the Fifth Amendment's guarantee against double jeopardy.[14] This Court, too, has heretofore signalled its acceptance of the general princi-

[10] Ashe v. Swenson, 397 U.S. 436, 443 (1970); United States v. Nash, 447 F.2d 1382, 1385 (4th Cir. 1971).

[11] Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 31 (1960).

[12] *See* Mayers and Yarbrough, *supra*, at 31-32.

[13] *See* United States v. Oppenheim, 242 U.S. 85 (1916).

[14] *See* Ashe v. Swenson, *supra*, 397 U.S. at 445. Since the contours of collateral estoppel in federal criminal cases seem to be coextensive with those established by the Double Jeopardy Clause, we perceive no need to rest our decision in this case on constitutional grounds. *See* Sealfon v. United States, 332 U.S. 575 (1948). Nonetheless, requiring Phillips to counter evidence introduced by the government tending to show his presence at the bank for a second time seems akin to the type of harassment against which the Double Jeopardy Clause was intended to protect. *See* Mayers and Yarbrough, *supra*, at 4-5.

ple, and its readiness to apply it in an appropriate case.[15]

Perhaps the most vexatious task facing a court in the application of collateral estoppel is the determination whether a particular factual issue has been settled by the prior adjudication.[16] At common law, the inquiry was often an excruciatingly technical one, the court having to cull "ultimate fact" from "mediate data" with an almost thomistic exactitude.[17] The federal courts, however, have exhibited a marked tendency to forego over-refined technique in favor of a more practical approach, at least in criminal cases. This modern attitude is articulated in Ashe v. Swenson, *supra*:

> "The Federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hyper-technical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court 'to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to

[15] United States v. Nash, *supra*.

[16] *See* Mayers and Yarbrough, *supra*, at 33-39.

[17] *See, e.g.*, Judge L. Hand's discussion in The Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944).

> foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' Sealfon v. United States, 332 U.S. 575, 579. Any test more mechanically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." [18]

Among the "hyper-technical" devices to be eschewed under this view, then, is the notion that a general verdict of acquittal "may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases . . ." [19] Each general verdict of acquittal must be examined carefully, to determine what facts, if any, can be deemed to have been adjudicated.

Pursuing this approach, and after reviewing the indictments, the trial transcripts, the various colloquys between court and counsel, the exchanges between the court and jury, the jury's decision in the first trial to acquit Phillips of bank robbery, and setting the "inquiry into a practical frame," we are

[18] 397 U.S. at 421 (footnotes omitted). *See also* United States v. Kramer, 289 F.2d 909 (2d Cir. 1961); United States v. DeAngelo, 138 F.2d 466 (3d Cir. 1943).

The quoted language from *Ashe* indicates that, though the jury in this case returned no explicit "not guilty" verdict on the charge of bank robbery, its failure to return a verdict of guilty must be taken as an acquittal for all intents and purposes.

[19] United States v. Kramer, *supra*, 289 F.2d at 913.

convinced that the first jury effectively determined that Phillips was not in the bank at the time of the robbery.

Several circumstances support this conclusion. First, the jury inquired specifically whether a finding of *presence in the bank* was requisite to a conviction under the robbery statute. They were instructed, in no uncertain terms, that it was.[20] A scant ten minutes after being so enlightened, they declined to return a verdict of guilty on the robbery charge. A "realistic and rational" appraisal of these facts tends to show that the pivotal factual question in the jury's deliberations was whether Phillips was present in the bank. The jury's decision not to convict, following so closely upon the heels of the clarifying instruction, leads almost inexorably to the conclusion that, at least in the jury's eye, Phillips was not in the bank at the time of the robbery, or that the government had failed to prove that Phillips was in the bank at the time of the robbery. Any test more mechanically restrictive "might well amount to a rejection of the rule of collateral estoppel."

The conclusion by the first jury that Phillips was not in the bank is buttressed by a secondary matrix of factual circumstances. None of the witnesses called by the prosecution at the first trial could positively identify Phillips as one of the bank robbers. Moreover, Phillips' own witnesses testified that he

[20] It appears that, to secure a conviction of bank robbery under 28 U.S.C. § 2113(a), the presence of a defendant in the bank *is* a requisite element of the offense. *See* Note 2, *supra*.

was elsewhere at the time of the robbery. There thus existed a rationally supportive basis in the evidence for a conclusion by the jury that Phillips was *not* in the bank. Although it is possible, as the dissent suggests, to infer that the jury did not specifically determine the question whether Phillips was present at the bank, the evidence at the first trial, when taken together with the jury instructions and other factors, leaves little doubt concerning the significance of the jury's failure to convict Phillips of robbery.

The dissent does not adopt the foregoing analysis for two reasons. First, it ascribes some weight to the fact that the jury did not affirmatively state that it found Phillips not guilty of bank robbery but, instead, convicted him of possession of stolen money while simply remaining silent with respect to the bank robbery count. The dissent correctly notes that the jury's response to the bank robbery charge is somewhat ambiguous. But in light of the substantial interests of criminal defendants at stake, it would appear inappropriate to attach significance to the absence of an affirmative statement by the jury indicating its finding of not guilty when, for all practical purposes, the jury's silence is to be treated in the same manner as an affirmative statement. For example, the defendant is entitled to a judgment of acquittal and, as the dissent acknowledges, the defendant receives full double jeopardy protection.

Second, the dissent suggests several explanations for the jury's failure to convict Phillips of bank robbery which are not bottomed on the assumption that

the jury unanimously agreed that Phillips was not present in the bank at the time of the robbery. This speculation does not seem particularly persuasive when juxtaposed against the jury's question concerning the necessity of deciding that Phillips was in the bank in order to convict him of bank robbery, the judge's response in the form of a supplemental instruction and the jury's verdict shortly thereafter. Moreover, once a criminal defendant has undergone a trial and a favorable verdict, considerations of fairness and traditional judicial reluctance to explore the factors prompting jury decisions seem to dictate resolving doubts, at least under circumstances as here, in favor of the defendant.[21]

Having ascertained that the result at the first trial established Phillips' absence from the bank during the robbery, the government was thus foreclosed from relitigating the question of Phillips' presence in the bank. The trial court's limiting instruction, to

---

[21] The dissent also attempts to buttress its position on purely policy grounds. In so doing, it cites language of Judge Friendly in U. S. v. Maybury, 274 F.2d 899 (2d Cir. 1960). *Maybury*, however, involved inconsistent verdicts rendered by a judge. To reach such verdicts, the judge was required to make a factual finding on one count for the defendant in the context of a particular dispute and to make a finding against the defendant on precisely the same issue in a second count. Thus, unlike this case, the same tribunal found both for and against the defendant on a particular issue. Refusal to apply collateral estoppel in *Maybury*, therefore, is not necessarily inconsistent with the application of the doctrine in this case. This conclusion may be supported by the fact that the appellate court carefully distinguished findings of fact by a judge from verdicts by a jury.

the effect that evidence of presence in the bank was intended only to show Phillips' knowledge that the funds he received were stolen, was insufficiently protective.

At Phillips' second trial, government counsel opened his case by telling the jury that he hoped to prove Phillips' participation in the bank robbery.[22] One government witness, the president of the bank, testified as to the aggravated nature of the robbery.[23] Another, Joseph Warren, testified that Phillips had told him that he (Phillips) had robbed the bank, and had been inside it during the robbery.[24] Finally, during his summation, government counsel again referred to Phillips' participation in the robbery, particularly as evidenced by Warren's testimony.[25]

Thus, the government sought to prove precisely the factual issue that had been foreclosed by the result in the first trial. Admission of evidence on this issue was erroneous.[26] Moreover, government counsel's reference to such evidence in his opening and

---

[22] Tr. 15, trial of Nov. 14, 1973.

[23] Tr. 64, trial of Nov. 14, 1973.

[24] Tr. 120, trial of Nov. 14, 1973.

[25] Tr. 257, trial of Nov. 14, 1973.

[26] Concededly, the record in this case did not manifest the same type of prosecutorial "bad conduct" adverted to in *Ashe*, *see* 397 U.S. at 445-47 and n. 10. Nonetheless, the principle enunciated in that case must be applied here, since there was no indication given by the Supreme Court that prosecutorial "bad conduct" is a prerequisite to application of collateral estoppel.

closing statements compounded the error. Nor, after reviewing all the evidence introduced at Phillips' second trial, can we say that the admission of evidence tending to show Phillips' presence at the bank and the use of physical coercion during the robbery constituted harmless error.[27] For example, the trial court permitted at the second trial, over defense counsel's objections, testimony to the effect that there was a gunshot during the perpetration of the bank robbery.[28] Once the first jury had refused to convict Phillips of bank robbery, such evidence, under the foregoing analysis, was inadmissible. The prejudicial impact of this testimony was potentially great, especially when the prosecutor also attempted to link Phillips with the bank robbery, and may not be overlooked on review. Nowhere in the record or in the briefs appears a justification for admission at the second trial on possession of testimony relat-

---

[27] See Rule 52(a), Federal Rules of Criminal Procedure.

[28] The following colloquy took place during the direct examination of the government's witness, Allen C. Watson, the President of the First Virginia Bank of Nansemond:

> Q. Mr. Watson, you previously testified as to whether or not the individuals had weapons. Do you know whether or not any weapon was discharged in the bank?
>
> MR. OWENS [counsel for Phillips]: Objection, your Honor.
>
> The Court: Overrule the objection.
>
> MR. OWENS: It has nothing to do with our case.
>
> The Court: All right, I'll overrule the objection.
>
> The Witness: When I dashed into my office, I immediately heard a—what sounded like a gunshot.

Tr. 69, trial of November 14, 1973.

ing to events during the bank robbery. Such testimony would have been apposite only for a charge under 18 U.S.C. § 2113(d) but, at the second trial, no charge under this section was pending against Phillips.

Accordingly, the judgment of conviction will be reversed, and the case remanded to the district court for a new trial.

CRAVEN, Circuit Judge, dissenting:

I respectfully dissent from the decision to reverse Phillips' second conviction for possessing stolen bank money. There are, I believe, two independent reasons why collateral estoppel should not apply in this case.

First, Phillips' acquittal of bank robbery was only an implicit acquittal, arising by operation of law from the verdict of guilt on a lesser included offense.[1] I would hold that such an implicit acquittal cannot be the basis for collateral estoppel because it leaves doubt whether the jury has made any factual determination in favor of the accused. For the purposes of subsequent prosecution for the *greater* offense, the jury's silence is properly given the effect of an acquittal. It is unnecessary to speculate about the jury's

---

[1] The verdict is quoted on page 3 of the majority opinion. Like the majority, I find it unnecessary to decide whether possession of stolen bank money under 18 U.S.C. § 2113(c) is included in the offense of bank robbery under § 2113(a). I have merely assumed, for purposes of this case, that it is.

actual decision because the doctrine of double jeopardy does not require an actual verdict. *See United States* v. *Jorn*, 400 U.S. 470 (1971). When the jury has been impaneled and discharged under these circumstances, the exposure to conviction on the greater charge is enough to bar reprosecution. *Green* v. *United States*, 355 U.S. 184, 188 (1957). For collateral estoppel, however, an actual verdict is required, because the doctrine is premised on a factual determination in favor of the accused. The jury's silence on the primary charge, coupled with conviction on a lesser offense, may suggest the kind of factual determination on which collateral estoppel is premised, but there is always a substantial likelihood that the jury reached no agreement at all on the primary charge. *See United States ex rel. Hetenyi* v. *Wilkins*, 348 F.2d 844, 856-57 (2d Cir. 1965), *cert. denied*, 383 U.S. 913 (1966).

If Phillips' first jury had returned a clear verdict of acquittal ten minutes after the trial judge delivered the supplemental instruction,[2] I would agree that the jurors had probably decided Phillips was not in the bank at the time of the robbery. But other aspects of this case cast substantial doubt on the jury's decision. The supplemental instruction on presence in the bank and the instruction on the lesser included offense were both given in response to the jury's question. The jury was not told that it had to find Phillips not guilty of bank robbery before it could

[2] Quoted at page 3 of the majority opinion.

find him guilty of possessing stolen money. As a result, the jury could have reached its verdict without ever deciding whether Phillips was in the bank. The jury's question does indicate that some jurors believed Phillips was not in the bank, but I do not think it proves unanimity where the verdict is silent. An aiding and abetting instruction had been given in the original charge, and the jury may have hoped the judge would give them an instruction that would relieve them of deciding whether he was in the bank.[3] In summary, paraphrasing *Ashe* v. *Swenson*, 397 U.S. at 444, I am convinced that a rational jury could have reached its verdict without deciding the issue which the defendant seeks to foreclose from consideration.

Second, even if I agreed that the implied acquittal could be set up as a collateral estoppel, I would not allow its use to restrict proof on retrial of the *lesser* charge. Retrial in cases like this one harbors none of the prosecutorial abuses that supplied the rationale of *Ashe* v. *Swenson* and its nonconstitutional forbears. *See United States* v. *Kramer*, 289 F.2d 909, 916 (2d Cir. 1961). The prosecutor cannot be accused of using the first trial as a practice run, of recasting the charge in slightly different form to get

[3] The record of the first trial does not show why the jury was not instructed that Phillips could have aided and abetted the bank robbery without being present at the bank. I would be surprised if the law were otherwise. *See* United States v. Waters, 461 F.2d 248 (10th Cir.), *cert. denied*, 409 U.S. 880 (1972); Asher v. United States, 394 F.2d 424 (9th Cir. 1968); Tarkington v. United States, 194 F.2d 63 (4th Cir. 1952).

a second chance for conviction, or of harassing the defendant by repeatedly calling him to answer the same proof. *Cf. Ashe* v. *Swenson*, 397 U.S. at 445-47 & n.10; *United States* v. *Nash*, 447 F.2d 1382, 1387 (4th Cir. 1971) (Winter, J., concurring); *United States* v. *Davis*, 369 F.2d 775, 780 (4th Cir. 1966), *cert. denied*, 386 U.S. 909 (1967). With or without collateral estoppel, the second trial will not be a replay of the first, and the second jury cannot be invited to convict the accused because he is guilty of the first crime. Evidence that tends to prove the first crime may not be used unless it is relevant to the second, and even then it may be excluded if the trial judge believes it more prejudicial than probative. *See United States* v. *Woods*, 484 F.2d 127, 134 (4th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3523 (1974); *United States* v. *Smith*, 446 F.2d 200 (4th Cir. 1971).

Applying collateral estoppel to retrials like this one will serve none of the purposes of the doctrine, and I believe it will unjustifiably tip the balance in favor of the defendant. The acquittal operates as a complete bar to reprosecution on the bank robbery. That is enough. That the trial judge belatedly charged on the lesser included offense cuts both ways: it was the basis for vacating the conviction [4] but also

---

[4] In Phillips' case the trial judge granted defendant's motion for new trial, giving as his reason:

> [I]n an abundance of caution, it may be that the charge of the lesser offense, given as it was, after a time of deliberation, could have been unduly influencing upon the jury.

App. 3. The trial judge had omitted the instruction on possessing stolen money from the original charge at the request of defense counsel who, in the judge's words, "was willing to go whole hog or nothing." Tr. 343, Trial of April 16, 17, 1973. The jury's question persuaded the judge that withholding the instruction was error.

may have saved the defendant from a conviction for bank robbery. *See United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960); Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 16-28 (1960). If the defendant can also use the acquittal as collateral estoppel on retrial of the conviction, he may be able to keep the second jury from hearing evidence that helped persuade the first jury of his guilt. This result, in Judge Friendly's words, "would convert the guarantee of double jeopardy from a shield into a sword." *United States* v. *Maybury*, 274 F.2d at 905.[5]

---

[5] Only a few federal cases have applied collateral estoppel as between an acquittal and a conviction rendered at the same trial. United States v. Pappas (Appeal of Mischlich), 445 F.2d 1194 (3d Cir.), *cert. denied*, 404 U.S. 984 (1971); Green v. United States, 426 F.2d 661 (D.C. Cir. 1970); Travers v. United States, 335 F.2d 698, 703 (D.C. Cir. 1964) (dictum); Cosgrove v. United States, 224 F.2d 146 (9th Cir. 1954), *modified on rehearing*, 224 F.2d 157 (1955); United States v. Flowers, 255 F. Supp. 485 (E.D.N.C. 1966). *Compare* United States v. Finnerty, 470 F.2d 78 (3d Cir. 1972); United States v. Carbone, 378 F.2d 420 (2d Cir.), *cert. denied*, 389 U.S. 914 (1967). In United States v. Maybury, 274 F.2d 899 (2d Cir. 1960), a divided court reversed a conviction because it was inconsistent with an acquittal rendered at the same bench trial. Over Judge Lumbard's dissent, Judge

Ashe v. *Swenson* did not pretend to define the outer limits of collateral estoppel, since the Court there found a clear case for applying the doctrine. In concluding that collateral estoppel is embodied in the concept of double jeopardy, the Court said: "For whatever else that constitutional guarantee may embrace, . . . it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." 397 U.S. at 445-46 (citations omitted). This principle should not be applied when its only effect is to help a person convicted of a lesser offense elude fair retrial on the charge. Collateral estoppel is a doctrine of fairness. It does not seem to me unfair to subject the appellant to retrial for a lesser offense of which he had been convicted. I think the defendant got more than he was entitled to when the first conviction was vacated. To set aside the second conviction is too much of a good thing.

Friendly and Judge Hand held that collateral estoppel would not bar retrial of the conviction. Judge Friendly also expressed his opinion that collateral estoppel should not be allowed to restrict the evidence on retrial. Judge Hand did not address this final point, apparently because it was unnecessary for disposition of the immediate appeal.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73-2516

UNITED STATES OF AMERICA, APPELLEE

v.

EDDIE LAWRENCE PHILLIPS, APPELLANT

Appeal from the United States District Court for the Eastern District of Virginia

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for further proceedings consistent with the opinion of this Court filed herewith.

/s/ William K. Slate, II
Clerk

[Filed June 3, 1975]

APPENDIX D

The federal bank robbery act, 18 U.S.C. 2113, provides:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any "insured institution" as defined in section 401 of the National Housing Act, as amended, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act.

(h) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the Administrator of the National Credit Union Administration.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 588591 6